Supreme Court, U.S.
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No. 06-91

IN THE
SUPREME COURT OF THE UNITED STATES

DIETRICH & ASSOCIATES, P.L.C.,
PETITIONER

v

CAROLYN ROGERS,
GEOFFREY FIEGER, and
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Michigan Court of Appeals' conclusion that the doctrine of res judicata barred Petitioner's suit was inconsistent with Petitioner's fundamental federal right of due process pursuant to the Fourteenth Amendment; this extreme application of res judicata was inappropriate because Petitioner's suit was independent from the prior litigation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The parties to this petition are:

- Dietrich & Associates, PLC, Petitioner
- Carolyn Rogers, Respondent
- Geoffrey Fieger, Respondent
- Fieger, Fieger, Kenney & Johnson, P.C., Respondent

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

Petitioner is not a corporation that has issued shares to the public, nor is it a parent corporation, a subsidiary or affiliate of corporations that have done so.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals, (*Dietrich & Associates, v Rogers*, an unreported decision of the Michigan Court of Appeals, docket number, 250702, released January 27, 2005)), the highest court to review the merits appears at Appendix A to the petition and is unpublished.

The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal (*Dietrich & Associates v Rogers*, 474 Mich 898; 705 NW2d 113 (2005)), appears at Appendix B to the petition.

The order of the Michigan Supreme Court denying Petitioner's motion for reconsideration of its denial of leave to appeal (*Dietrich & Associates v Rogers*, 474 Mich 1065; 711 NW2d 299 (2006)), appears at Appendix C to the petition.

JURISDICTION

The Michigan Supreme Court entered its order denying Petitioner's timely application for leave to appeal from the Michigan Court of Appeals on February 27, 2006. A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 USC 1257(a). Under 28 USC 1257(a), this Court may grant a petition for a writ of certiorari to review any case "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution (Appendix D), which provides in relevant part as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises out of the horrible and unfortunate circumstances that left a woman without her husband and an unborn child without her father. John Rogers was an esteemed associate at Petitioner's law firm for over 11 years. (Dietrich & Cassavaugh P.C. was a Predecessor to Dietrich & Associates PLLC). Mr. Rogers was on his way to court when a tragic auto accident occurred, wherein he was killed by drivers of a vehicle that was evading the police in a high-speed chase in the city of Detroit.

In the years following Mr. Rogers' death, Petitioners helped Mrs. Carol Rogers with the settling of her husband's estate and handled two causes of action obtaining a sizable amount of ($450,000.00) under the Rogers' uninsured motorist insurance coverage as well as obtaining monetary Worker's Compensation benefits. The Worker's Compensation benefits provided an income to Mrs. Rogers over a ten-year period. No fee was ever charged for any of this work, although it was understood that a fee would be paid from a prospective wrongful death case. In addition, Petitioner spent an extensive amount of time counseling and aiding Mrs. Rogers through this difficult period in her life. Petitioner conducted extensive and in depth legal and investigative work in connection with these two cases as well as the wrongful death suit against the City of Detroit.

After conducting an extensive investigation concerning the wrongful death cause of action, Petitioner had extensive discussions with Carolyn Rogers, the Personal Representative. Rogers authorized the retention of Geoffrey Fieger and his firm as trial counsel. She also authorized one third of the total recovery be paid for total legal services. It was further agreed that Petitioner would continue as co-counsel and receive one third of the total legal fee. The Dietrich firm was copied on the pleadings as co-counsel and Edgar Dietrich, principal of the firm conducted settlement discussions with the City of Detroit and the client. The

relationship between Petitioner and Fieger was further confirmed by letters from Fieger verifying the authorized fee relationship wherein Petitioner would receive one third of the total fee of any recovery from the wrongful death suit and Fieger and his firm would receive two thirds. The letters confirming this relationship were written and signed by Fieger.

Fieger proceeded to file a wrongful death suit on behalf of Carolyn Rogers. The *Rogers v City of Detroit* case was tried by a jury resulting in a verdict of about $6,000,000 that with interest rose to in excess of $9,000,000 by the time it was paid. The jury verdict was confirmed by the Court of Appeals and upheld by the Michigan Supreme Court at 457 Mich 125; 579 NW 2d 840 (1998).

Petitioner requested that Fieger honor his obligation to pay approximately $1,000,000 due under the attorney fee agreement. Fieger without explanation refused payment and dared Petitioner firm to file suit. Petitioner then filed suit against Fieger: *Dietrich & Associates, PLC v Geoffrey Fieger* et. al., Wayne Circuit Case 98-837522 CK. Fieger moved for summary disposition. The trial court granted summary disposition. The improprieties committed by Fieger and the trial court with regard to summary disposition were set forth at paragraph 58 of Petitioner's complaint in the instant action.[1] Complaint attached as Appendix E.

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1. Paragraph 58 of Petitioner's complaint in the case at bar set forth the following improprieties in the Dietrich & Associates v Fieger case:

   a. Granting summary disposition of said action when the Fieger Defendants were in default and not properly before the court;
   b. Granting summary disposition absent the present of record of supported evidence;
   c. Granting summary disposition based upon the fraudulent statements and misrepresentations of the Fieger Defendants;
   d. Granting summary disposition based upon the improper assignment of the duty to disclose the compensation agreement to client solely upon Plaintiff whereas it was required to be

The Michigan Court of Appeals in an unpublished decision dated December 28, 2001, Docket 224870, upheld the Wayne County decision.

Petitioner's complaint in this case was brought in part under the independent action provisions of MCR 2.612(C)(3) (attached as Appendix F), pursuant to the reasoning of *Trost v Buckstop Lure Co, Inc,* 249 Mich App 580; 644 NW2d 54 (2002). (*Trost,* attached as Exhibit G). The complaint included allegations of fraud, conspiracy, tortious interference with contract, unjust enrichment, promissory estoppel, breach of contract and conversion.

Unlike *Dietrich & Associates, PLC v Geoffrey Fieger* et. al., Wayne Circuit Case 98-837522 CK, the case at bar named Carolyn Rogers as a party and alleged that she cooperated and conspired with Fieger in depriving Petitioner of its compensation.

Respondent filed a Motion for Change of Venue, or in the Alternative, Motion to Dismiss (Motion for Summary Disposition). Judge Colleen A. O'Brien of the Oakland County Circuit Court granted Respondent's motion on the basis of res judicata, ruling that the present suit was barred

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shared between the Fieger Defendants and the Plaintiff (See Informal Ethics Opinion. R-I-234 dated May 10, 1995);

e. Granting summary disposition based upon the improper application of the provisions of the Michigan Rules of Professional Conduct;

f. Granting summary disposition without permitting the Plaintiff to obtain discovery which would establish the basis for the recovery sought;

g. Granting summary disposition in spite of the existence of a contract between the parties;

h. Granting summary disposition when it was known to the Court that doing so would serve to subject the Plaintiff to substantial damage and inequity.

i. Other items that will be determined during the course of discovery and investigation in this matter. (Complaint, attached as Appendix E).

by the *Dietrich & Associates, PLC v Geoffrey Fieger* suit. Judge O'Brien's Order of Dismissal was entered August 8, 2003.

Petitioner filed a claim of appeal of right to the Michigan Court of Appeals on August 25, 2003. On appeal, Petitioner argued that res judicata could not bar the suit because the suit was an independent action supported by MCR 2.613 and *Trost*. On January 27, 2005, the Court of Appeals affirmed the trial court's grant of summary disposition. (Appendix A). The Court of Appeals ruled that *Trost* applied only to a judgment against a defendant, and not to one against a plaintiff. Despite the allegations of fraud, the Court of Appeals ruled res judicata defeated Petitioner's claim; thereby denying Petitioner an opportunity to show the existence of fraud in an independent action pursuant to MCR 2.612(C)(3) and *Trost*.

On March 10, 2005, Petitioner filed an application for leave to appeal to the Michigan Supreme Court. The Michigan Supreme Court denied the application for leave to appeal on October 31, 2005. (Appendix B). Petitioner then sought reconsideration of the Michigan Supreme Court's ruling with a motion for reconsideration filed November 17, 2005. The Michigan Supreme Court denied the motion for reconsideration on February 27, 2006. (Appendix C). Petitioner now files this petition for writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Michigan Court of Appeals' conclusion that the doctrine of res judicata barred Petitioner's suit was inconsistent with Petitioner's fundamental federal right of due process pursuant to the Fourteenth Amendment; this extreme application of res judicata was inappropriate because Petitioner's suit was independent from the prior litigation.

The Due Process Clause of the federal constitution protects Petitioner's right to invoke the processes created by state law for the enforcement of rights. It is true that state courts may generally develop their own rules for protecting against the relitigation of common issues. *Postal Telegraph Cable Co.* v. *Newport,* 247 US 464, 475; 38 S Ct 566; 62 L Ed 2d 1215 (1918). However, the extreme application of the doctrine of res judicata may be inconsistent with a federal right. *Richards v Jefferson County, Alabama*, 517 US 793; 116 S Ct 1761; 135 L Ed 2d 76 (1996), see also *South Central Bell Telephone Co v Alabama*, 526 US 160; 119 S Ct 1180; 143 L Ed 2d 258 (1999). An extreme application of res judicata will be barred if it deprives the party of the due process of law guaranteed by the Fourteenth Amendment. In the instant case, the Court of Appeals affirmance of the dismissal of Petitioner's suit on the grounds res judicata deprived Petitioner of its rights to due process under the Fourteenth Amendment.

This Court historically has recognized that the federal constitution protects access to the judicial processes established by the states. In *Logan v Zimmerman Brush Co*, 455 US 422; 1025 S Ct 1148; 71 L Ed 2d 265 (1982), the Court noted that it "traditionally has held that the Due

Process Clauses of the Fifth and Fourteenth Amendments protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as Petitioners attempting to redress grievances." *Id.* at 429. The protection emanates from the understanding that the Due Process Clause creates a constitutionally protected interest in access to a forum created by the state for such purposes. In the instant case, the rulings of the trial court, Michigan Court of Appeals and Michigan Supreme Court prevent Petitioner from having a forum in which to litigate its rights.

The trial court and the Michigan appellate courts failed to recognize that Petitioner's present suit was an independent action raising different allegations than the prior suit. Further, the trial court and the both courts ignored that this litigation included a different party, Carolyn Rogers as a defendant.

The complaint in this suit alleged causes of action arising from the relationship between Carolyn Rogers and Fieger, including conspiracy, tortious interference with contract, quantum meruit, and unjust enrichment. (Complaint, attached as Appendix E). These allegations were not involved in the prior suit. Res judicata applies only if a new case is on the same subject matter and is between the same parties or their privies. Because Petitioner's action was an independent action from the first suit, the doctrine of res judicata may not defeat the action. This second suit raised different causes of actions and added a new party as defendant. The Court of Appeals' affirmance of the use of res judicata to defeat Petitioner's independent action has violated Petitioner's right to due process under the Fourteenth Amendment.

The Michigan courts' extreme application of the doctrine of res judicata in this case was inconsistent with Petitioner's right to due process under the Fourteenth Amendment. While this action might raise issues similar to those in *Dietrich & Associates, PLC v Geoffrey Fieger*, et al, Wayne County Circuit Court Case No. 98-837522-CK,

Carolyn Rogers was not a party to that case. Therefore, she is not entitled to the protection of res judicata.

One of the requirements for the imposition of the doctrine of res judicata is that the prior suit be between the same parties or their privies. *Adair v State*, 470 Mich 105; 680 NW2d 386 (2004). Privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation. *Phinisee v Rogers*, 229 Mich App 547; 582 NW2d 852 (1999). There is no privity between Fieger and Rogers in respect to the fee dispute between Dietrich & Associates and Fieger.

Fieger's interests are not the same as those of Carolyn Rogers in respect to a fee dispute. In this suit, Respondent Fieger had an interest in recovering and keeping the full attorney fee and defeating Petitioner's lawful attorney fee claim, Carolyn Rogers would not necessarily have the same interest. Put succinctly it would cost Carolyn Rogers nothing for the claimed attorney fee to be paid to Petitioner whereas it would cost Respondent Fieger one million dollars to pay this fee.

As is stated in *Viele v DCMA*, 167 Mich App 571; 423 NW2d 270 (1988): "there is no general prevailing definition of privity, it has been described as including a person so identified in interest with another that he or she represents the same legal right." It does appear to be clear that as one reason for the application of res judicata to apply notice must be given the intended privy:

> A prerequisite to a party's ability to involve the doctrine of res judicata in a subsequent proceeding is that the party must have given adequate notice of the prior proceeding to the persons who are to be bound by the adjudication. *Viele, supra* at p.582

There is no evidence that Carolyn Rogers was notified of the *Dietrich & Associates v Fieger* case.

Finally Petitioner's complaint alleged causes of action arising from the relationship between Carolyn Rogers and Fieger including conspiracy, tortious interference with contract, quantum meruit and unjust enrichment which either are claims as to Carolyn Rogers alone or are against Rogers and Fieger acting together. (Appendix E). These allegations were not involved in prior litigation and were not relevant to the prior litigation without the presence of Carolyn Rogers.

The Court of Appeals' affirmance of summary disposition has precluded Petitioner from having an opportunity to be heard in the matter. The due process clause of the Fourteenth Amendment requires that Petitioner have its day in court in this matter. The Michigan Courts' rulings applying res judicata to defeat Petitioner's suit violated Petitioner's right to due process.

Further, the rulings by the trial court and appellate courts in this matter completely abrogates the concept of an independent action validated by MCR 2.612 and *Trost.* In *Trost v Buckstop Lure* 249 Mich App 580; 644 NW2d 54 (2002), (Appendix G) the Court of Appeals established a five-part test for whether a subsequent suit was a proper independent action. This five-part test provides that:

1) The Judgment is one that ought not, in equity and good conscience, be enforced.
2) There is a valid claim or defense to the alleged cause of action on which the judgment is founded.
3) Fraud, accident, or mistake prevented the Defendant from obtaining the benefit of the defense.
4) There was no negligence or fault on the part of the Defendant.
5) There is no adequate remedy available at law.

Petitioner asserts that its complaint meets Michigan's standards for an independent action. Firstly, it is certainly not equitable that Petitioner receive no compensation for its services when it did the original work on the wrongful death action, obtained a $450,000 uninsured motorist award, and a worker's compensation recovery, while Fieger retains the entire attorney fee. This is especially true since Petitioner remained an attorney of record after bringing Fieger into the wrongful death suit.

Secondly, Petitioner has asserted a valid claim. (The one million dollar contracted share of attorney fees).

Thirdly, Petitioner has alleged fraud and misrepresentation in connection with the previous proceedings (Fieger wrote letters confirming the attorney fee agreement and represented that permission had been obtained.)

Fourth, there is no negligence by Petitioner.

Finally, fifth, Petitioner has no adequate remedy at law.

While *Trost* clearly involved an independent action filed by a **defendant** seeking relief from a judgment imposed on him, there is no reason articulated by the Court of Appeals as to why this same remedy ought not to be available to a **plaintiff** against whom a judgment has been rendered. Plaintiffs and defendants can both have judgments rendered against them for which some relief, in limited circumstances ought to be available. The Court Rule contemplates fraud as being one of those circumstances. There is no reason to anticipate that a plaintiff is less likely than a defendant to be victimized by a fraud on the court. Nevertheless, the Court of Appeals, by its ruling, simply dismisses the possibility that a plaintiff might be able to seek such a remedy as was recognized in *Trost*.

The remedy is explicitly recognized in the MCR 2.613(C)(3):

(C) Grounds for Relief from Judgment.

> (3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; . . . or to set aside a judgment for fraud on the court. MCR 2.613(C)(3) attached as Appendix F.

The Court Rule makes no distinction between plaintiffs and defendants, and there is no articulated reason in the Court of Appeals opinion for this distinction. Moreover, the *Trost* court found this commentary on the Rule to be "particularly persuasive":

> Relief from a judgment by an independent equitable action has been recognized in Michigan as proper on numerous grounds, including the following: judgment void for lack of jurisdiction; newly-discovered evidence; after-discovered defense; and extrinsic fraud in the procurement of a judgment. If the judgment is not void for lack of jurisdiction, the party seeking relief from a judgment by an independent equitable action must show that it has a meritorious defense *or cause of action* before equitable relief will be given. Michigan Court Rules Practice, Rule 2.612, § 2612.17, p 483 (citations omitted; emphasis added).

Thus, the *Trost* court itself noted that its reasoning ought to apply to both plaintiffs and defendants. There is really no reason to expect that defendants are any more likely to be affected by a fraud worked upon the court than are plaintiffs

The procedure of an independent action to relieve a party from the effects of a judgment can only be invoked after judgment has issued. It should be obvious that if res judicata can be used to defeat a party seeking a remedy under this rule, then the rule is a nullity. Under this flawed interpretation, the court rule provides an avenue for a suit,

however the trial court and appellate courts in this matter have completely nullified the right to suit. The Michigan courts' refusal to permit Petitioner to raise the independent action because of res judicata deprived Petitioner of the due process of law guaranteed by the Fourteenth Amendment.

By ruling Petitioner's action was barred, the Michigan Courts have prevented Petitioner from any opportunity for hearing on the claims of the second suit, including the claims of fraud. Petitioner's complaint made allegations of fraud giving rise to the right to seek relief in an independent action.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted

Catherine Coash

Date 7/11/06

Catherine Coash
Attorney for Petitioner

APPENDIX A

Court of Appeals of Michigan

DIETRICH & ASSOCIATES,
Plaintiff-Appellant,
v

CAROLYN ROGERS, GEOFFREY FIEGER, AND FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,
Defendants-Appellees

An unreported decision of the Michigan Court of Appeals,
Docket No. 250702,
released Jan. 27, 2005.

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

[UNPUBLISHED]

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its complaint. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff first argues that the trial court failed to recognize that it's suit seeking payment of attorney fees properly stated an "independent action" under the five-part test of *Trost v. Buckstop Lure Co, Inc*, 249 Mich App 580, 588-589; 644 NW2d 54 (2002). We disagree. The portion of *Trost* relied on by plaintiff is inapposite to the present case because its five-part test is directed at when a party may obtain equitable relief in an independent action from a judgment that has been entered against it. The *Trost* test applies to circumstances in which a judgment has been entered against a party in the

sense of imposing liability on that party in favor of another party. In particular, one requirement of the five-part test is a showing that there is a valid defense to the alleged cause of action on which the judgment is founded. *Id.* at 589. In this case, plaintiff is not attempting to obtain such relief from a judgment imposing liability on it, but rather is seeking to affirmatively impose liability on defendants. Thus, the five-part test of *Trost* pertaining to equitable relief from a judgment is inapplicable, and plaintiff is not entitled to relief on this basis.

Plaintiff next argues that the trial court erred in granting summary disposition to defendants without conducting an evidentiary hearing because of its allegations of fraud. We disagree. The authority cited by plaintiff indicates that it is generally an abuse of discretion for a trial court to decide a motion for relief from a judgment or an order based on fraud without conducting an evidentiary hearing. *Kiefer v. Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995). But, in dismissing plaintiff's case, the trial court was not deciding a motion for relief from a judgment or an order. Rather, it resolved defendants' motion to dismiss the case. Thus, the authority relied on by plaintiff does not indicate that the trial court was required to hold an evidentiary hearing on the matter. Further, the motion to dismiss was predicated on plaintiff's claims being barred by the doctrine of res judicata. Accordingly, the motion presented a legal issue as to which an evidentiary hearing was unnecessary. Therefore, plaintiff is not entitled to relief based on this issue.

Finally, plaintiff argues that the trial court erred by dismissing this case on the basis of res judicata because the case involved an "independent action," named defendant Carolyn Rogers as a defendant (unlike the prior Wayne Circuit Court action), and involved different allegations than the prior litigation. We disagree. Whether res judicata bars a subsequent action is reviewed de novo. *Adair v. Michigan*,

470 Mich. 105, 119; 680 NW2d 386 (2004). The doctrine of res judicata bars a subsequent action when (1) a prior action was decided on the merits, (2) both actions involve "the same parties or their privies," and (3) the matter in the second action was or could have been resolved in the first. *Id.* at 121. Michigan law applies res judicata broadly to bar "not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Id. Clearly, the prior Wayne Circuit Court action in which defendants Fieger and his law firm obtained a grant of summary disposition in their favor was decided on the merits and involved the same matter as the present case. Moreover, plaintiff's substantive claims in this case were, or with reasonable diligence, could have been raised in the earlier case. Accordingly, res judicata bars plaintiff's claims against Fieger and his law firm.[1]

The only remaining question is whether defendant Rogers is also protected from the present suit by the doctrine of res judicata based on privity with Fieger and his law firm. Parties are in privity for this purpose if "the first litigant represents the same legal right that the later litigant is trying to assert." *Id.* at 122. In naming Rogers as a defendant, plaintiff must be claiming that it is entitled to recover a portion of its claimed attorney fee from her. In this regard, Fieger and his law firm effectively represented Carolyn's "legal right" in opposing plaintiff's claim of an entitlement to such an attorney fee in the earlier action. Accordingly, Carolyn is in privity with Fieger and his law firm for purposes of this case and, thus, is also protected against

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[1] Although the Fieger law firm has a different name in this case than in the prior action, it is apparent that, even if they are two distinct entities, they are in privity for purposes of this action because plaintiff's claim against the current Fieger law firm must be based on it being responsible for the conduct of the earlier law firm.

plaintiff's claims by the doctrine of res judicata. The trial court properly dismissed the case on the basis of res judicata.

Affirmed.

APPENDIX B

Supreme Court of Michigan

DIETRICH & ASSOCIATES
Plaintiff-Appellant

v

CAROLYN ROGERS, GEOFFREY FIEGER, AND FIEGER, FIEGER, KENNEY & JOHNSON, P.C.
Defendants-Appellees

474 Mich 898; 705 NW2d 113 (2005)
NO. 128179
COA No. 250702.
October 31, 2005

Disposition: On order of the Court, the application for leave to appeal the January 27, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

APPENDIX C

Supreme Court of Michigan

DIETRICH & ASSOCIATES,
Plaintiff-Appellant,

v

CAROLYN ROGERS, GEOFFREY FIEGER, AND FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,
Defendants-Appellees.

474 Mich 1065, 711 NW2d 299 (2006)
Docket No. 128179 (38)
COA No. 250702
Feb. 27, 2006

On order of the Court, the motion for reconsideration of this Court's order of October 31, 2005 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

APPENDIX D

FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment to the United States Constitution provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

STATE OF MICHIGAN

OAKLAND COUNTY CIRCUIT COURT

DIETRICH AND ASSOCIATES

Plaintiff,

v

CAROLYN ROGERS, GEOFFREY FIEGER, and FIEGER, FIEGER, KENNEY & JOHNSON P.C.
Jointly and Severally

Defendants

S.E. Michigan Law Associates, P.L.L.C.
By: Thomas J. Lange Jr. (P59401)
By: David S. DelBoccio (P64042)
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COMPLAINT FOR CONSPIRACY, TORTIOUS INTERFERENCE WITH CONTRACT, QUANTUM MERUIT, UNJUST ENRICHMENT, PROMISSORY ESTOPPELS, BREACH OF CONTRACT, CONCERT OF ACTION, CONVERSION, AND FOR INDEPENDENT RELIEF

JURY DEMAND

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in the Circuit Court for the third judicial circuit (Wayne County), where it was given docket number 98-837522-CK and assigned to Judge Michael James Callahan. The action is no longer pending.

NOW COMES the Plaintiff, Dietrich and Associates and for its Complaint as to the Defendants herein, states as follows:

1. Plaintiff is a Michigan corporation now in the process of winding up its affairs pursuant to MCLA 450.1833, is the successor in interest to Dietrich & Cassavaugh, P.C. and maintains it offices in the City of Grosse Pointe, County of Wayne and State of Michigan.
2. Defendant Carolyn Rogers is the widow of John Rogers, a former employee of Dietrich & Cassavaugh, P.C. and is believed to be a resident of the City of Grosse Pointe Farms, County of Wayne and State of Michigan.
3. Defendant Geoffrey Fieger is a licensed attorney in the State of Michigan and maintains his practice at 19390 West Ten Mile Road in the City of Southfield, County of Oakland and State of Michigan.
4. Defendant Fieger, Fieger, Kenney & Johnson, P.C. is a Michigan professional corporation maintaining its principle place of business at 19390 West Ten Mile Road in the City of Southfield, County of Oakland and State of Michigan and is the successor in interest to the firm of Fieger & Fieger.
5. The acts, transactions and events leading to this litigation took place in the County of Oakland and the County of Wayne.

6. The amount in controversy in this matter is in excess of $25,000.00, exclusive of interest, costs and attorneys fees and this matter is properly before this Court.

FACTUAL ALLEGATIONS

7. In 1989, John Rogers, the deceased husband of the Defendant, Carolyn Rogers, was killed when his automobile was struck by individuals involved in a police chase while he was driving in the course of his employment with Dietrich & Cassavaugh, P.C.

8. Plaintiff was thereafter retained by the Defendant, Carolyn Rogers, to pursue the legal remedies which may be available to her, including workers' compensation, no-fault and uninsured motorist actions as well as potential civil actions involving the driver of the other vehicle and the City of Detroit, as well as opening and maintaining a probate action on John Rogers.

9. Plaintiff Carolyn Rogers was able to obtain very substantial recoveries on behalf of Defendant Carolyn Rogers in both workers' compensation and no-fault matters after devoting considerable time, effort and expense on her behalf.

10. Plaintiff received no compensation for these services in both uninsured motorist and workers' compensation matters, based upon the agreement that it would be compensated through the proceeds of the contemplated wrongful death action and because of the structured nature of the payments in both matters.

11. In the course of investigating, researching and preparing the wrongful death action, Plaintiff determined that the best interests of Defendant Rogers would be served by the affiliation of Defendant Fieger as co-counsel with Plaintiff in handling the wrongful death action.

12. After a number of discussions with the Defendant Rogers, she agreed that we would seek the involvement of the Defendant, Fieger.

13. Upon consultation with the Fieger Defendants, it was agreed between Plaintiff and Defendants that the Defendants would work with the Plaintiff in the wrongful death action with any resultant fees being apportioned two-thirds to Defendant Fieger and one-third to the Plaintiff, as memorialized in the correspondence of the Defendant Fieger attached hereto as Exhibit A.

14. The wrongful death litigation was successfully prosecuted with an eventual recovery in excess of Nine Million ($9,000,000.00) dollars being obtained following the resolution of the appellate process.

15. The Plaintiff continued to be involved in the prosecution of this matter and was co-counsel.

16. Upon the recovery in the wrongful death action, attorney fees in excess of Three Million ($3,000,000.00) dollars were generated.

17. In violation of and contrary to the agreement between the Defendants and the Plaintiff, no fee was ever paid to the Plaintiff, the Fieger Defendants retaining all attorney fees.

18. Earlier litigation as noted in the caption above was instituted by Plaintiff, against the Fieger Defendants, said case was dismissed based upon material misrepresentations on the part of the Fieger Defendants, constituting a fraud upon the Court, (as detailed further herein), and giving rise to the right of the Plaintiff to pursue this independent action in accordance with the provisions of the Michigan Court Rules.

19. The actions of the Fieger Defendants and the errors of the Court in dismissing the prior action are of such magnitude that it would be inequitable and contrary to the interests of justice to permit it to stand and

allow the Fieger Defendants to be the beneficiaries of their improper actions.

20. Upon information and belief, the Fieger Defendants sought and obtained the assistance of the Defendant Rogers in those actions and in deliberately seeking to deprive the Plaintiff of its rightful share of the fees generated.

COUNT I – CIVIL CONSPIRACY

21. Plaintiff incorporates herein by reference all allegations set firth within Paragraphs 1 through 20 of this Complaint.

22. Pursuant to the agreements between the Plaintiff and the Defendants, the Plaintiff is entitled to a one-third share of the attorney fees generated in the wrongful death action in compensation of its services in the workers' compensation and no-fault actions and for Plaintiff's services rendered with respect to the wrongful death action, including the referral to and seeking of the involvement of the Fieger Defendants therein.

23. The agreements of the parties is further memorialized by the correspondence of the Fieger Defendants attached hereto as Exhibit A, which was known to and consented to by the Defendant Rogers.

24. Upon the resolution of the wrongful death action, the Fieger Defendants refused and actively sought to prevent the Plaintiff from obtaining its rightful share of the fees generated.

25. In order to do so, the Fieger Defendants attempted to establish a ruse through which they could claim that Plaintiff was not entitled to any fee based upon the provisions of MRPC 1.5(E).

26. This ruse could be established only through the participation and involvement of the Defendant Rogers, who signed a statement in the form of a bar

grievance, (that is believed to have been prepared by the Fieger Defendants), falsely claiming that she was unaware of and did not consent to the sharing of fees. Attached hereto as Exhibit B is the letter dated April 26, 1999, dismissing the grievance.

27. The Fieger Defendants also submitted an Affidavit based upon this false statement which constituted further misrepresentation to the Court.

28. The trial Court in the Wayne County Circuit Court matter relied upon this false statement and false affidavit in dismissing the action.

29. The purpose and intent of the Defendants was to prevent the Plaintiff from obtaining any fees for the extensive legal services it provided in all of the actions taken on behalf of the Defendant Rogers.

30. As a result of this conspiracy, the Plaintiff has been deprived any payment for its extensive legal work on Defendant Rogers' behalf and as agreed to by the parties hereto.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT II – TORTIOUS INTERFERENCE

31. Plaintiff incorporates by reference all allegations set forth within Paragraphs 1 through 30 of this Complaint.

32. Plaintiff and the Fieger Defendants, as a result of negotiations and discussion, entered into a contract calling for a one-third share of the fees generated in the wrongful death action to be paid to the Plaintiff.

33. The contract between the Fieger Defendants and the Plaintiff is memorialized by virtue of the correspondence attached hereto as Exhibit A.

34. The Plaintiff held numerous discussions with the Defendant Rogers concerning the inclusion of the Fieger Defendants as co-counsel, the fees generated in the worker's compensation and no-fault actions and the sharing of fees that may be generated as a result of the wrongful death action, which was consented to by the Defendant Rogers.

35. Contrary to the agreement and consent of the Defendants, the Plaintiff has not been paid for the services it provided in any of those matters.

36. During the approximately ten years it took to complete the wrongful death action, Defendant Rogers personally raised no objection to the sharing of fees between Plaintiff and the Fieger Defendants. At the time for distribution of proceeds, the Fieger Defendants refused to discuss compensation with the Plaintiff.

37. The Defendant Rogers obtained all proceeds of the workers' compensation and no-fault matters as well as more than Six Million ($6,000,000.00) dollars from the wrongful death action.

38. Defendants' refusal to compensate the Plaintiff was based upon the aforementioned statement of the Defendant Rogers, which was contrary to fact and which constitutes a tortuous interference in the contractual agreement between Plaintiff and the Fieger Defendants.

39. Although the Plaintiff has reason to believe that the interference of the Defendant Rogers was due to the undue influence of the Fieger Defendants, said interference has resulted in the Plaintiff being deprived of its rightful compensation.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT III – QUANTUM MERUIT

40. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 39 of this Complaint.

41. Plaintiff provided valuable services to the Defendant Rogers with respect to the wrongful death of her husband which resulted in the recovery of in excess of Ten Million ($10,000,000.00) dollars.

42. All of the Defendants benefited from the services rendered by the Plaintiff in the actions pursued on behalf of the Defendant Rogers. Total recoveries were in excess of Ten Million ($10,000,000.00) dollars.

43. Plaintiff has not been reimbursed for various expenses incurred on behalf of the Defendant Rogers in the prosecution said matters, despite the substantial recoveries.

44. Despite the considerable payments to both Fieger and Rogers, Plaintiff has received absolutely no compensation whatsoever for any of the recoveries that it obtained in the workers' compensation and no-fault actions, the recovery that was obtained through its participation in the wrongful death action, including negotiating the involvement of the Fieger Defendants and has not been reimbursed in any way for the expenses incurred or the hours Plaintiff put in.

45. Based upon the doctrine of quantum meruit, the Plaintiff is entitled to compensation in an amount deemed to represent the reasonable value of the services rendered and reimbursement of expenses.

46. Considering the nature of the recoveries obtained on behalf of the Defendant Rogers, and the agreement with the Fieger Defendants, the reasonable fee for the services of the Plaintiff is a one-third share of the fees generated.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT IV – UNJUST ENRICHMENT

47. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 46 of this Complaint.
48. Plaintiff rendered substantial and extensive legal services upon behalf of the Defendant Rogers and the estate of John Rogers in the wrongful death, workers' compensation, uninsured motorist, and probate of the deceased's estate.
49. All of the Defendants benefited from the services rendered by the Plaintiff, to the extent of over Ten Million ($10,000,000.00) recovered, while Plaintiff has received no compensation for its extensive work.
50. Plaintiff has never been compensated for any services or expenses that it has provided.
51. The Defendants have, therefore, been unjustly enriched by Plaintiff's efforts, yet have failed and refused to compensate and reimburse the Plaintiff and Plaintiff is entitled to reasonable fees for its services in the amount of its one-third share in the fees generated plus expenses advanced.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT V – INDEPENDENT ACTION

52. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 51 of this Complaint.

53. In seeking to enforce the terms of the contract and agreement with the Defendants, the Plaintiff previously filed litigation as to the Fieger Defendants.

54. That litigation was dismissed by the trial Court based the misrepresentations of the Defendants, contrary to the provisions of the Michigan Court Rules.

55. MCR 2.612(C)(3) authorizes and permits the filing of an independent action to obtain relief from a judgment or order based upon various grounds, including but not limited to the presence of substantial inequity or fraud.

56. Permitting the Defendants to retain the monies paid to them without compensating the Plaintiff and the conduct of the Court as set forth herein constitutes an egregious and substantial inequity.

57. Fraud was committed upon the Court in obtaining the dismissal of the prior action including, but not limited to the following particulars:

    a. Failing to disclose the concert of action and conspiracy between the Defendants;
    b. Arguing before the Court the existence of alleged facts which were not supported by or evidenced by sworn testimony or affidavits;
    c. Arguing the existence of an alleged conflict of interest on the part of the Plaintiff which did not exist;
    d. Arguing the existence of an objection on the part of the Defendant Rogers when no objection had been presented until the time came for the distribution of proceeds and when the objection is believed to have been prepared by the Fieger Defendants;

e. Leading and causing Plaintiff to believe and rely upon agreement set forth within the correspondence of the Fieger Defendants attached hereto as Exhibit A;

f. Other instances of improper conduct which will be determined through the course of discovery and investigation of this matter.

58. The proceedings before the Court leading to the grant of summary disposition of the prior action were grossly improper and constituted a violation of the substantial property rights of the Plaintiff in the following particulars:

a. Granting summary disposition of said action when the Fieger Defendants were in default and not properly before the Court;

b. Granting summary disposition absent the presence of record of supported evidence;

c. Granting summary disposition based upon the fraudulent statements and misrepresentations of the Fieger Defendants;

d. Granting summary disposition based upon the improper assignment of the duty to disclose the compensation agreement to client solely upon Plaintiff whereas it was required to be shared between the Fieger Defendants and the Plaintiff (See Informal Ethics Open R-I-234 dated May 10, 1995);

e. Granting summary disposition based upon the improper application of the provisions of the Michigan Rules of Professional Conduct;

f. Granting summary disposition without permitting the Plaintiff to obtain discovery which would establish the basis for the recovery sought;

g. Granting summary disposition in spite of the existence of a contract between the parties;

h. Granting summary disposition when it was known to the Court that doing so would serve to

subject the Plaintiff to substantial damage and inequity;

i. Other items which will be determined during the course of discovery and investigation in this matter.

59. As a result of the foregoing, the Plaintiff has been significantly damaged in an amount in excess of One Million ($1,000,000.00) dollars.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT VI – PROMISSORY ESTOPPEL

60. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 59 of this Complaint.

61. An agreement was reached between Plaintiff and the Fieger Defendants with respect to the apportionment of fees that may be generated as a result of the prosecution of the wrongful death action on behalf of the Estate of John Rogers.

62. That agreement called for the Plaintiff to obtain a one-third share of those fees in excess of Three Million ($3,000,000.00) dollars.

63. The Fieger Defendants knew and intended that the Plaintiff would rely upon the agreement with respect to those fees and documented the agreement in the correspondence attached hereto as Exhibit A.

64. The Plaintiff did rely upon said agreement as well as the obligations imposed upon the Fieger Defendants by virtue of the Michigan Rules of Professional Conduct, Plaintiff further relies on said agreement as an expression of professional obligation.

65. In spite of the agreement reflecting a clear meeting of the minds, the Fieger Defendants acted unequivocally to deprive the Plaintiff of its rightful share of the fees generated.

66. Pursuant to the doctrine of promissory estoppel, the Fieger Defendants are obligated to compensate the Plaintiff in the amount of its one-third share of fees generated in the wrongful death action.

WHEREFORE, the Plaintiff herein respectfully requests that this Honorable Court enter a Judgment in its favor in an amount deemed to constitute adequate compensation, together with costs, interest, and attorney fees so unjustly sustained.

COUNT VII – BREACH OF CONTRACT

67. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 66 of this Complaint.

68. Defendant Rogers entered into a contract with Plaintiff to pursue the legal remedies which might be available to her as previously alleged.

69. The Fieger Defendants were brought into this contract by agreement between Plaintiff and Defendants to be co-counsel for trial of the wrongful death action.

70. Under this contract, the Attorneys were to be compensated out of any proceeds recovered in the wrongful death suit.

71. The agreed upon compensation was to be one-third (1/3) of any net proceeds recovered.

72. Upon the entry of the Fieger Defendants, it was agreed by Plaintiff and Defendants that the compensation would be apportioned with one-third (1/3) going to Plaintiff and the remainder to the Fieger Defendants as stated in Paragraph 13.

73. Plaintiff fulfilled all its obligations under the contract.

74. As stated in Paragraph 14, in excess of Nine Million ($9,000,000.00) dollars was recovered in the wrongful death action.

75. As stated in Paragraph 16, this resulted in attorney compensation in excess of Three Million ($3,000,000.00) dollars.

76. Under the contract, Plaintiff was entitled to one-third (1/3) of that compensation, or in excess of One Million ($1,000,000.00) dollars.

77. Defendants, jointly and severally, have failed and refused to pay Plaintiff said compensation.

78. Defendants' conduct as described in this Complaint constituted a breach of the contract between the parties.

79. Plaintiff has been damaged by Defendants' breach in an amount in excess of One Million ($1,000,000.00) dollars.

PLAINTIFF REQUESTS that this Court enter Judgment in its favor and against Defendants, jointly and severally, in an amount in excess of One Million ($1,000,000.00) dollars as it shall deem appropriated, plus interest at the statutory rate from the date of filing and that the Court grant it such other and different relief as the Court deems warranted.

COUNT VIII – CONCERT OF ACTION

80. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 79 of this Complaint.

81. At all relevant times, several or all Defendants engaged in concerted activities as described in Paragraphs 1 through 79 by express or implied agreement.

82. Plaintiff may not be able to specify which Defendant is responsible for each of the activities of Defendants

due to the generic similarity of such activities as produced and promoted by these Defendants.

83. As a direct and proximate result of Defendants' concerted activities, Plaintiff has sustained and will continue to sustain severe injuries and damages as more specifically alleged above.

84. Due to the concert of action among all of the various Defendants, each is liable to Plaintiff for these injuries and damages, even if there was no direct relation to the activity conducted by that particular Defendant.

85. Defendants are jointly, severally and/or alternatively liable.

PLAINTIFF REQUESTS that this Court enter Judgment in its favor and against Defendants, jointly and severally, in an amount deemed to constitute adequate compensation, together with costs, interest and attorney fees so unjustly sustained.

COUNT XI – CONVERSION

86. Plaintiff incorporates herein by reference all allegations contained within Paragraphs 1 through 85 of this Complaint.

87. As stated above, Plaintiff was entitled to one ninth (1/9) of the recovery in the wrongful death action as compensation and upon payment of the recovery to the Estate was entitled to immediate possession of said one-ninth of said recovery.

88. Over nine million ($9,000,000) dollars was recovered in the wrongful death action.

89. Said recovered funds were collected and disbursed by Defendants Fieger.

90. Plaintiff has repeatedly, both orally and in writing, demanded payment of his ninth of the recovery.

91. Defendants Fieger have, both expressly and by their silence, refused to pay over or to surrender these funds as described above.

92. Defendants Fieger misdelivered said compensation to themselves.

93. Defendant Rogers, knowing that Defendants Fieger were so refusing to so pay or surrender these funds, has by her actions as stated above aided and abetted Defendants Fieger in these actions.

94. These acts described above constitute an unlawful conversion at common law and under MCL 600.2919a of Plaintiff's property, resulting in damages to Plaintiff in excess of one million ($1,000,000) dollars.

PLAINTIFF REQUESTS that this court enter judgment against Defendant in the amount in excess of one million ($1,000,000) it determines appropriate in this case as the actual damages, and that amount be tripled in the final judgment as authorized by MCL 600.2919a, plus costs and reasonable attorney fees as authorized by the same statute.

JURY DEMAND

Plaintiff demands a jury trial.

Respectfully Submitted,

Thomas J. Lange, Jr. (P59401)
Attorney for Plaintiff
718 Notre Dame
Grosse Pointe, MI 48230

APPENDIX F

MICHIGAN COURT RULE 2.612 (MCR 2.612)

Relief From Judgment or Order

(A) Clerical Mistakes.

(1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

(2) If a claim of appeal is filed or an appellate court grants leave to appeal, the trial court may correct errors as provided in MCR 7.208(A) and (C).

(B) Defendant Not Personally Notified. A defendant over whom personal jurisdiction was necessary and acquired, but who did not in fact have knowledge of the pendency of the action, may enter an appearance within 1 year after final judgment, and if the defendant shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve the defendant from the judgment, order, or proceedings for which personal jurisdiction was necessary, on payment of costs or on conditions the court deems just.

(C) Grounds for Relief from Judgment.

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

(3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

APPENDIX G

Court of Appeals of Michigan

TROST

v

BUCKSTOP LURE COMPANY, INC

249 Mich App 580, 644 NW2d 54

Submitted June 6, 2001, at Grand Rapids.
Decided February 5, 2002, at 9:00 A.M.
Docket No(s) 220165.
Disposition: Affirmed.

Counsel:

Golden and Kunz, P.C. (by *Robert H. Golden* and *Armand D. Kunz*), for the plaintiffs.

Glassen, Rhead, McLean, Campbell & Schumacher (by *Kevin V. B. Schumacher*), for the defendant.

Judges:

Opinion by Per Curiam. Before: Neff, P.J., and Doctoroff and Wilder, JJ.

Per Curiam.

In this action seeking relief from a judgment, plaintiffs Fred

D. Trost and Fred D. Trost Enterprises, Inc.,[1] appeal as of right from a trial court order granting defendant summary disposition pursuant to MCR 2.116(C)(8). We affirm.

I. FACTS AND PROCEEDINGS

In 1992, defendant Buckstop Lure Company, Inc., filed a libel action against plaintiffs Fred D. Trost and Fred D. Trost Enterprises, Inc., in the Montcalm Circuit Court. Following a several-week trial, the trial court entered a judgment in the amount of $4 million in favor of Buckstop. As a result of that judgment, Trost filed an application for delayed leave to appeal on April 1, 1994. The parties then stipulated to dismiss the appeal with prejudice. Subsequently, on January 12, 1995, Trost filed another claim of appeal, seeking to appeal an order denying a motion to set aside a default. Again, this appeal was, by stipulation of the parties, dismissed with prejudice.

Then, on February 10, 1999, Trost filed in the circuit court the instant independent action against Buckstop. This action sought relief from the judgment in the previous action pursuant to MCR 2.612(C)(3). Specifically, Trost alleged (1) that the court in the previous action lacked subject-matter jurisdiction, (2) that the proofs elicited by Trost's counsel at trial had been "infirm and not cognizable by [the] court," (3) that the prior judgment had been "based upon an improper statement and understanding of the law by the Court," (4) that the conduct of and preparation for trial by Trost's counsel had been "either absent, incompetent or negligently performed and that [Trost] was deprived of the advice and presence of competent counsel," and (5) that "manifest injustice" had taken place as a result of these actions.

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[1] For ease of reference, because Fred D. Trost and Fred D. Trost Enterprises, Inc., are for all practical purposes the same entity, we will refer to both plaintiffs simply as "Trost.

Rather than filing an answer to Trost's complaint, Buckstop moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that MCR 2.612(C)(3) allowed a court to grant relief from a judgment in an independent action only if a party performed fraud on the court. In response, Trost argued that MCR 2.612(C)(3) provided three bases for an independent action seeking relief from judgment: (1) to relieve a party from a judgment, order, or proceeding, (2) to grant relief to a defendant not actually served, and (3) to set aside a judgment for fraud on the court. Trost further maintained that if the court did not have subject-matter jurisdiction over the underlying libel claim, MCR 2.612(C)(3) permits him to seek relief from the judgment. The trial court granted defendant's motion, finding that MCR 2.612(C)(3) provides relief from a judgment only when a defendant had not been personally notified or when fraud was perpetrated on the court, and that neither of those two bases had been pleaded by Trost. The trial court also found that even if MCR 2.612(C)(3) allowed independent actions solely "to relieve a party from a judgment, order, or proceeding," there was no showing of facts that would form the basis for such an action.

II. STANDARD OF REVIEW

This Court reviews de novo the grant of summary disposition, *Crown Technology Park v D&N Bank, FSB, 242 Mich App 538, 546; 619 NW2d 66 (2000)*, and will not affirm summary disposition under MCR 2.116(C)(8) unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a judgment in favor of the nonmoving party. *Smith v Stolberg, 231 Mich App 256, 258; 586 NW2d 103 (1998)*. For a motion to be granted under MCR 2.116(C)(8), the pleadings must make it clear that the plaintiff has failed to state a claim on which relief can be granted and that no amount of factual development would justify the plaintiff's claim for relief.

Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998).

III. ANALYSIS

The first question that we must decide is whether MCR 2.612(C)(3) allows a party to seek relief from a judgment in an independent action on grounds other than extrinsic fraud or nonservice. We conclude that it does.

MCR 2.612(C)(3) provides:

> This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

The express language of MCR 2.612(C)(3) provides that the provisions in MCR 2.612(C)(1) and (2) in no way "limit[s] the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding ... ." Hence, a party need not allege fraud or nonservice in order to seek relief from a judgment in an independent action pursuant to MCR 2.612(C)(3). In this regard, we find the following commentary to be particularly persuasive:

> MCR 2.612(C)(3) expressly notes that its provision for relief from judgment by a motion directly in the same proceedings "does not limit the power of a court to entertain an independent action to relieve a party from a judgment." In Michigan, an independent action in chancery for relief from a judgment has been long recognized. Such independent

> equitable actions granted relief either by setting aside the judgment, if rendered by the same court, or by enjoining its enforcement or execution or declaring it void, if rendered by another court. This equitable relief was most frequently granted as to judgments at law but was also available to restrain enforcement of an equity decree itself.
>
> Relief from a judgment by an independent equitable action has been recognized in Michigan as proper on numerous grounds, including the following: *judgment void for lack of jurisdiction;* newly-discovered evidence; after-discovered defense; and extrinsic fraud in the procurement of a judgment. If the judgment is not void for lack of jurisdiction, the party seeking relief from a judgment by an independent equitable action must show that it has a meritorious defense or cause of action before equitable relief will be given. [Michigan Court Rules Practice, Rule 2.612, § 2612.17, p 483 (citations omitted; emphasis added).]

In the instant case, Trost based his complaint on five factual grounds, including lack of subject-matter jurisdiction. Because the two prior appeals were dismissed with prejudice, there was no remedy at law available to Trost; therefore, the complaint, on its face, fulfilled the requirements of MCR 2.612(C)(3) and case law on independent actions. Accordingly, the trial court erred in determining that MCR 2.612(C)(3) only allowed for independent actions based on nonservice or extrinsic fraud.

Nonetheless, the court also found that even if MCR 2.612(C)(3) provided Trost with an independent action for

relief from the judgment, he had not pleaded sufficient facts to state a cause of action, and therefore, Buckstop was entitled to summary disposition. We agree.

In his complaint, Trost first alleged that because the court did not have subject-matter jurisdiction of Buckstop's initial libel claim, he was entitled to relief from the judgment. We disagree. As stated in *Grubb Creek Action Committee v Shiawassee Co Drain Comm'r, 218 Mich App 665, 668-669; 554 NW2d 612 (1996)*:

> Jurisdiction is the power of a court to act and the authority of a court to hear and determine a case. A court's subject-matter jurisdiction is determined only by reference to the allegations listed in the complaint. If it is apparent from the allegations that the matter alleged is within the class of cases with regard to which the court has the power to act, then subject-matter jurisdiction exists. Any subsequent error in the proceedings amounts to error in the exercise of jurisdiction. When a court lacks subject-matter jurisdiction, the court's acts and proceedings are of no force and validity.
>
> An order entered without subject-matter jurisdiction may be challenged collaterally and directly. Error in the exercise of jurisdiction may be challenged only on direct appeal. The erroneous exercise of jurisdiction does not void a court's jurisdiction as does the lack of subject-matter jurisdiction. However, error in the exercise of jurisdiction can result in the setting aside of the judgment. [Internal citations omitted.]

See also *In re Hatcher, 443 Mich 426, 439; 505 NW2d 834 (1993), Luscombe v Shedd's Food Products Corp, 212 Mich App 537, 541; 539 NW2d 210 (1995),* and *In re Waite, 188 Mich App 189, 196-197, 200; 468 NW2d 912 (1991).*

The prior action against Trost alleged libel and was brought in the circuit court. In Michigan, the circuit courts are courts of general jurisdiction and are vested with "original jurisdiction to hear and determine all civil claims" unless the constitution or statutes provide otherwise. MCL 600.605; see also MCL 600.601 and Const 1963, art 6, §§ 1, 13. The Legislature has provided for civil actions alleging libel. MCL 600.2911. In providing for these civil actions, the Legislature did not indicate that libel claims were to be brought in a court other than the circuit court. *Id.* Thus, it is apparent that Buckstop properly brought its libel action against Trost in the circuit court and that the circuit court had subject-matter jurisdiction over that claim. *Grubb, supra;* MCL 600.601, 600.2911; Const 1963, art 6, §§ 1, 13.

Trost argues that although Buckstop filed a complaint sounding in libel, because the complaint failed to allege when the libel took place, where and when it was published, and what words were false and stated with malice,[2] the circuit court lacked subject-matter jurisdiction. However, because subject-matter jurisdiction does not depend on

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[2] In the event that these allegations are true, we note that Trost's recourse was to move for summary disposition pursuant to MCR 2.116(C)(8). See *Rouch v Enquirer & News of Battle Creek (After Remand), 440 Mich 238, 272; 487 NW2d 205 (1992)* (Riley, J., concurring). However, the record does not indicate that Trost ever filed such a motion. Instead, the matter proceeded to a judgment. Because the matter proceeded to a judgment, Trost's remedy was an appeal as of right challenging the judgment, not an independent action. See *Waite, supra* at 200.

whether the claim is true or false, but instead on the allegations pleaded (and not the facts), *Luscombe, supra; Waite, supra* at 199, quoting *Fox v Martin, 287 Mich 147, 152; 283 NW 9 (1938)*, whether Buckstop's libel claim was sufficiently pleaded is of little import in determining whether the circuit court had subject-matter jurisdiction. Rather the focus is on whether the circuit court had a legal right to hear a particular case. *Buczkowski v Buczkowski, 351 Mich 216, 221-222; 88 NW2d 416 (1958)*; *Waite, supra* at 201, n 1. *Buczkowski, supra* at 222, illustrates the shortcomings of Trost's argument:

> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity.

Thus, while Trost may be correct in asserting that Buckstop's complaint in the prior action failed to plead libel with the required degree of specificity, such a failure would not have deprived the court of its jurisdiction over the subject matter. *Grubb, supra; Luscombe, supra; Waite, supra.* Trost's subject-matter jurisdiction allegation failed to state a claim on which relief could be granted, and therefore, Buckstop was entitled to summary disposition of this issue.

Because the judgment against Trost is not void for lack of jurisdiction, he is not entitled to equitable relief unless he can show that he had a meritorious defense in the underlying case. Michigan Court Rules Practice, *supra,* pp 482-484; *Finn v Adams, 138 Mich 258, 261; 101 NW 533 (1904).* We

have not found any Michigan case that describes with precision what must be provided in order to establish a meritorious defense. However, we note that federal courts have held that five essential elements must be satisfied for a party to be entitled to independent equitable relief: (1) the judgment is one that ought not, in equity and good conscience, be enforced, (2) there is a valid defense to the alleged cause of action on which the judgment is founded, (3) fraud, accident, or mistake prevented the defendant from obtaining the benefit of the defense, (4) there was no negligence or fault on the part of the defendant, and (5) there is no adequate remedy available at law. See Michigan Court Rules Practice, *supra,* pp 483-484, citing *In re West Texas Marketing Corp,* 12 F3d 497, 503, n 3 (CA 5, 1994), and *Bankers Mortgage Co v United States,* 423 F2d 73, 79 (CA 5, 1970). See also *Cresswell v Sullivan & Cromwell,* 922 F2d 60, 71 (CA 2, 1990), and *Carteret Savings & Loan Ass'n v Jackson,* 812 F2d 36, 39, n 6 (CA 1, 1987). Because we conclude that this federal test adequately reflects what Michigan requires in order to be entitled to relief from a judgment in an independent equitable action, we adopt it as our own.

Applying these five elements to the facts here, Trost fails to establish entitlement to relief from the judgment. Nothing in the lower court record establishes that Trost had a valid defense to the underlying cause of action. Because Trost has failed to establish a valid defense, it is evident that fraud, accident, or mistake did not prevent Trost from obtaining the benefit of a defense and that he is not entitled to a legal remedy. Further, there is no evidence disproving his own negligence or fault or suggesting that the prior judgment should not, in equity or good conscience, be enforced. Accordingly, Trost failed to establish any of the five elements and, as such, the trial court correctly granted

Buckstop's motion for summary disposition.[3]

Affirmed.

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[3] On appeal defendant also requested that this Court sanction Trost and award it actual costs and attorney fees. However, a review of the lower court record reveals that defendant never properly moved for sanctions. Thus, because defendant did not properly move for sanctions below, see MCR 2.114(E) and (F); MCR 2.625(A)(2), and the trial court declined to award them sua sponte, MCR 2.114(E), we decline to address this unpreserved issue on appeal. *Richmond Twp v Erbes, 195 Mich App 210, 225; 489 NW2d 504 (1992)*, citing *Lowman v Karp, 190 Mich App 448, 454; 476 NW2d 428 (1991)*. The Supreme Court effectively overruled *Richmond* on other grounds in *Bechtold v Morris, 443 Mich 105, 108-109; 503 NW2d 654 (1993)*.

No. 06-91

In The
Supreme Court of the United States

DIETRICH & ASSOCIATES, P.L.C.,

Petitioner,

v.

CAROLYN ROGERS, GEOFFREY FIEGER, and FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should decline jurisdiction over a state court action that does not raise a federal question.

LIST OF PARTIES

Petitioner Dietrich & Associates, P.L.C. is the successor to Dietrich & Cassavaugh, P.C., the employer of attorney John Rogers, the decedent in the underlying wrongful death suit out of which this alleged referral fee dispute arises.

Respondent Carolyn Rogers is the personal representative of the estate of John Rogers.

Respondent Geoffrey Fieger is the attorney who represented the estate of John Rogers in the underlying wrongful death lawsuit.

Respondent Fieger, Fieger, Kenney & Johnson is Respondent Geoffrey Fieger's law firm.

CORPORATE DISCLOSURE

Respondent Fieger, Fieger, Kenney and Johnson P.C. is a privately held professional corporation.

Geoffrey Fieger and Carolyn Rogers are private citizens.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Carolyn Rogers, Geoffrey Fieger, and Fieger, Fieger, Kenney & Johnson respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the Order of the Michigan Supreme Court that denied Petitioner's application for leave to appeal to the Michigan Supreme Court from the unpublished Michigan Court of Appeals decision.

OPINIONS BELOW

The January 27, 2005 unpublished panel opinion from the Michigan Court of Appeals affirmed the Wayne County circuit court's grant of summary disposition on *res judicata* grounds (Petitioner's Apx A). The October 31, 2005 Michigan Supreme Court order denying leave is reported at 474 Mich. 898, 705 N.W.2d 113 (2005) (Petitioner's Apx B). The February 27, 2006 order denying reconsideration is reported at 474 Mich. 1065, 711 N.W.2d 299 (2006) (Petitioner's Apx C).

JURISDICTION

Petitioner alleges jurisdiction under the 28 U.S.C. § 1257(a) clause that the state court decision addresses a contention that a title right, privilege, or immunity is "set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." In fact, the petition raises no

federal question but only issues of Michigan *res judicata* law.

STATEMENT OF THE CASE

I. Overview

This petition is at odds with basic principles of Michigan's *res judicata* law barring successive suits over the same claim. The Fourteenth Amendment due process clause is not remotely implicated by the Michigan decisions.

The man pulling the strings behind the curtain in this case is Edgar Dietrich, a former Michigan lawyer, whose license was revoked in 2001. Dietrich now conducts his deception through inexperienced and unsuspecting lawyers and legal assistants. This case has been handled through Dietrich's office, a literal revolving door of attorneys, who are fed misinformation by Dietrich himself. In fact, Petitioner Dietrich & Associates P.L.C., is presently inactive as a legal entity in Michigan.

II. Underlying Facts

In 1989 John Rogers was a skilled attorney employed as an associate by Petitioner's predecessor, Dietrich & Cassavaugh, P.C. The firm agreed to pay Rogers a percentage of the fees generated by work he performed on the firm's files. One morning, on his way to court, John Rogers was the innocent victim of a high-speed, reckless City of Detroit police car chase. He was killed in the accident, leaving his pregnant widow, Carol Rogers.

Edgar Dietrich, through Dietrich & Cassavaugh, P.C., boasts that they "took care" of the Rogers' probate estate for no charge, but he deserves no pat on the back. While Dietrich obtained a $450,000 settlement on the uninsured motorist policy, this settlement was $50,000 *below* policy limits, when damages clearly exceeded the policy limits. Although it is true that Dietrich negotiated Mr. Rogers' workers compensation claim, even this is somewhat suspicious since Dietrich was Rogers' employer.

The worst conflict was created in Petitioner's handling of the Rogers estate. At the time of his death, Rogers was working on numerous contingency fee cases for the law firm. As the attorney for the estate, Petitioner had a fiduciary duty to the estate to collect the monies owed to the estate, including *quantum meruit* attorney fees on the cases that Mr. Rogers had worked on that were later resolved. In fact, Petitioner never paid this money into the Rogers estate.

Attorney Geoffrey Fieger filed a wrongful death lawsuit against the City of Detroit Police Department and obtained a $6.2 million jury verdict for the Rogers estate. After a protracted and costly appellate battle to the Michigan Supreme Court, Fieger and his law firm recovered over $11 million dollars for the estate. *Rogers v. City of Detroit*, 457 Mich. 125, 579 N.W.2d 840 (1998). The Fieger law firm represented the Rogers estate throughout the decade-long case and was solely responsible for the outcome. Petitioner has since repeatedly, unsuccessfully, claimed entitlement to a portion of the attorney fee in the wrongful death case.

III. The First Referral Fee Suit

Petitioner sued Fieger and his law firm for a referral fee, but the Wayne County circuit court granted summary disposition for Fieger, ruling that Dietrich failed to prove the existence of a valid referral fee. The Michigan Court of Appeals affirmed in a December 28, 2001 unpublished opinion (No. 224870) saying, "We affirm the trial court for the reason it stated: plaintiffs performed no work in the *Rogers* case." (Respondent's Apx 6). Reconsideration was denied on February 25, 2002, and Dietrich's leave application to the Michigan Supreme Court was denied on January 30, 2003.

IV. The Present Suit

Undeterred, Petitioner sought yet another bite of the apple by filing another lawsuit in the adjacent Oakland County circuit court adding Carolyn Rogers as a party and claiming a conspiracy with Fieger. (Petitioner's Apx E). The Oakland circuit court dismissed Petitioner's claim specifically finding that "Plaintiff's claims have been previously adjudicated in the Wayne County Circuit Court, the Michigan Court of Appeals, and Michigan Supreme Court." The Michigan Court of Appeals affirmed on *res judicata* grounds. (Petitioner's Apx A). The Michigan Supreme Court denied leave. (Petitioner's Apx B).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Should Decline Jurisdiction Because The Petition Does Not Raise A Federal Question.

Merely alleging a federal question does not give rise to Supreme Court jurisdiction; rather the case must turn on "a real and not merely formal Federal question." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 311, 23 S.Ct 123, 47 L.Ed. 190 (1902) ["it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction"]. The federal question must be substantial. The Court will not consider questions that are so lacking in substance that no further argument is required. *Hodges v. Snyder*, 261 U.S. 600, 601, 43 S.Ct. 435, 67 L.Ed. 819 (1923) ["It should [not] be granted if the questions on which the decision depends are so wanting in substance as not to need further argument"]. This petition presents no "important federal question" or "important question of federal law." Sup. Ct. R. 10. Until this petition, Dietrich had raised no federal question at all.

Assuming arguendo that there is a federal question, it was neither "pressed" by Petitioner, nor "passed upon" by any Michigan court. See e.g., *Illinois v. Gates*, 462 U.S. 213, 218, n.1, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) [issue must either be raised or "squarely considered and resolved" by state court]. It is important in a federal system to give state courts the first chance to evaluate the constitutionality of state statutes which might be construed to save their constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S.Ct. 1161, 11 L.Ed.2d 298 (1969) [dismissed writ when petitioner failed to raise, and state court failed to pass on, issue]. As the *Cardinale* Court remarked,

"Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."

It is incumbent upon Petitioner to establish that the federal issue it now raises was timely pressed or passed upon, but Petitioner did not, and cannot, do so. Neither its Michigan Court of Appeals brief, nor its Michigan Supreme Court leave application or supplemental brief, nor its leave denial reconsideration motion raised any federal question. Moreover, this Court has specifically held that the application of *res judicata* is a matter of state law over which the Supreme Court has no jurisdiction. *Mansell v. Mansell*, 490 U.S. 581, 586, n.5, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

Relying upon, *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999), Petitioner asserts that the present petition represents an "extreme application of *res judicata* inconsistent with a federal right," but those decisions are inapposite. First, in both *Richards* and *South Central Bell*, the issue was both raised at, and "squarely considered" by, the Alabama Supreme Court. Moreover, in both cases, it was petitioners who were strangers to the prior judgment. Here, Respondent Carolyn Rogers, a privy of Fieger and the Fieger law firm throughout the lawsuit, but who was not named in the previous suit by Petitioner. The claim preclusion in this case affects Petitioner Dietrich & Associates, P.L.C., who was the same claimant in the first lawsuit. As the Michigan state courts properly recognized, these two cases are the same causes of action.

Moreover, even if a case satisfies 28 U.S.C. § 1257, the court may simply choose not to review it. Sup. Ct. R. 10 makes it clear that review is discretionary and will be granted only for "compelling reasons." The petition fails this test. Throughout the Michigan proceedings, Petitioner never once raised a federal question, much less "an important federal question." This case meets the criteria of neither Sup. Ct. R. 10 nor 28 U.S.C. § 1257. It would be inappropriate for this Court to exercise its jurisdiction.

CONCLUSION

The petition should be denied because it raises only a Michigan state law issue unique to Petitioner. The federal issue Petitioner now proposes was never "pressed or passed upon" by any Michigan court. The Michigan decision rests on independent and adequate state grounds.

Respectfully submitted,

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Date: August 21, 2006

2001 WL 1699846

STATE OF MICHIGAN

COURT OF APPEALS

DIETRICH & ASSOCIATES P.L.C., DIETRICH & CASSAVAUGH, P.C., and EDGAR J. DIETRICH, Plaintiffs-Appellants,	UNPUBLISHED December 28, 2001
v	No. 224870 Wayne Circuit Court LC No. 98-837522-CK
GEOFFREY FIEGER and FIEGER, FIEGER & SCHWARTZ, P.C., Defendants-Appellees.	

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition under MCR 2.116(C)(7) and (10) in favor of defendants. We affirm.

This case involves a dispute regarding an alleged referral fee between plaintiff Edgar J. Dietrich and his law firm and Geoffrey Fieger and his law firm. Fieger represented Carol Rogers, the widow of John Rogers, who has been an attorney with plaintiff Dietrich & Cassavaugh, P.C. (the predecessor to Dietrich & Associates, P.L.C.) in a wrongful death suit arising out of John Rogers' death in an automobile accident (involving a high-speed police chase) as he was traveling to the Wayne County Circuit Court. Plaintiffs contend that they are owed a substantial referral

fee following the jury's verdict, which exceeded six million dollars.[1]

Following defendants' motion for summary disposition, the trial court granted summary disposition in favor of defendants, ruling that plaintiffs failed to prove the existence of a valid referral fee. More specifically, the trial court ruled that there was no showing, pursuant to the requirements of MRPC 1.5(e), that Carol Rogers was advised of and did not object to the division of the attorney fee between plaintiffs and defendants. On appeal, plaintiffs argue that the trial court erred in granting summary disposition for defendants because the motion was not properly before the trial court, the trial court applied the wrong standard of review, and there was no evidence supporting the position taken by defendant as a matter of fact and law. Plaintiffs also argue that the trial court failed to properly rule on their claim that a settlement agreement was breached and failed to rule on their quantum meruit claim.

The trial court granted summary disposition under MCR 2.116(C)(7) (invalid contract) and (10) (no genuine issue as to any material fact and defendants entitled to judgment as a matter of law). A trial court's ruling on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). Under both MCR 2.116(C)(7) and (10), the pleadings, affidavits, admissions, depositions, and other documentary evidence filed in the action or submitted by the parties must be considered by the court. MCR 2.116(G)(5).

---

[1] Our Supreme Court ultimately upheld the jury's verdict in *Rogers v. Detroit,* 457 Mich 125; 579 NW2d 840 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and the evidence must be evaluated in a light most favorable to the nonmoving party. *Maiden, supra,* p 120. Where the proffered evidence fails to establish a genuine issue of any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs first contend that the trial court erred in granting summary disposition because a default had been entered against defendants on February 18, 1999, and defendants filed their motion for summary disposition (on May 12, 1999) before the default was set aside (in an order entered on May 18, 1999). Plaintiffs, therefore, argue that the motion for summary disposition was not properly before the trial court. This issue is actually waived for appellate review because plaintiffs never raised this issue before the trial court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993). Moreover, we do not believe that this issue compels reversal because defendants moved to set aside the default on April 22, 1999, the hearing was held on May 5, 1999, at which time the trial court orally ruled that it was setting aside the default, and the order memorializing this ruling was entered on May 18, 1999, six days after defendants filed their motion for summary disposition. Additionally, the hearing on defendants' motion for summary disposition was held on December 14, 1999, and plaintiffs never argued that this motion was not properly before the trial court.

Plaintiffs also argue that the trial court applied the wrong standard of review in ruling on the motion and that defendants failed to come forward with admissible evidence to support the motion. Plaintiffs' argument is

meritless. The trial court did not apply the wrong standard of review. Moreover, the evidentiary burden to prove the existence of a valid contract is on plaintiffs, not on defendants. MCR 2.116(G)(4) "plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Maiden, supra,* p 121. As stated in *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996):

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. . . . The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. . . . Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. . . . If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.

The trial court's ruling was premised on MRPC 1.5(e), which states:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> (1) the client is advised of and does not object to the participation of all lawyers involved; and
>
> (2) the total fee is reasonable.

The comment to MRPC 1.5 states that "[p]aragraph (e) permits the lawyers to divide a fee on agreement between the participating lawyers if the client is advised and does not object." The trial court specifically ruled that there was no evidence that Carol Rogers, the client, was advised of and did not object to the division of fees.

Upon review of the record, we agree with the trial court that plaintiffs presented no evidence that Carol Rogers was advised of, and consequently did not object to, any division of the attorney fee. Although there is some indication that there was an agreement or understanding between the lawyers regarding a division of the fee, there is simply no evidence that Carol Rogers was advised of this division as required by MRPC 1.5(e). In fact, Carol Rogers, in a letter dated November 30, 1998, specifically stated that Dietrich did not advise her of any attempt to obtain a division of the fee. Therefore, plaintiffs have failed to meet their evidentiary burden of proving a genuine issue of a material fact regarding the division of the attorney fee.

Plaintiffs also argue that the trial court erred by failing to enforce a settlement agreement. However, no settlement agreement was actually entered into in this case. Although there were settlement discussions or negotiations, the parties never entered into any settlement agreement. Under MCR 2.507(H), to be binding, an agreement between the parties must be made in open court or in writing. Because no settlement agreement was made in open court or in writing, there was no settlement agreement for the trial court to enforce.

Lastly, plaintiffs contend that the trial court erred in failing to rule on their quantum meruit claim. The trial court's specific ruling was that "the lack of [a] contract for the referral fee is outcome determinative" and did not believe that it was necessary to rule more specifically on the quantum meruit claim. The trial court further stated, "Mr. Dietrich did nothing with respect to [Mr. Fieger's] prosecution of the wrongful death case."

Plaintiffs argue that should this Court find that there was no referral fee contract, then the quantum meruit claim should be addressed, acknowledging that a quantum meruit claim normally arises where there is no referral fee agreement. An attorney may be entitled to compensation for the reasonable value of services rendered on the basis of quantum meruit, provided that the attorney's discharge was wrongful or the withdrawal was with cause. *Morris v Detroit,* 189 Mich App 271, 278; 472 NW2d 43 (1991). Although plaintiffs maintain that they acted as co-counsel in the underlying *Rogers* case and "did considerable and valuable work for Mrs. Rogers," plaintiffs do not state exactly what work they performed on the *Rogers* case.

We affirm the trial court for the reason it stated: plaintiffs performed no work on the *Rogers* case. After judgment had been entered in the *Rogers* case, plaintiffs moved to intervene as co-counsel and the trial court denied the motion. Plaintiffs' subsequent motion for recognition of lien on the judgment proceeds on the underlying *Rogers* case was also denied by the trial court. There is no evidence that plaintiffs ever represented Carol Rogers in the underlying wrongful death case and there is no evidence that plaintiffs performed any work on that case.

Consequently, plaintiffs have not shown that they are entitled to a fee under a theory of quantum meruit.

Affirmed.

/s/ Mark J. Cavanaugh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen